



February 3, 2022

Submitted online: <https://rules.cityofnewyork.us/rule/fair-workweek-law-for-fast-food-workers/>
And via e-mail: Rulecomments@dca.nyc.gov

Peter A. Hatch, Commissioner
New York City Department of
Consumer and Worker Protection
42 Broadway, Manhattan, New York

Re: Comments on Proposed Rules to Implement Local Laws 1 and 2 of 2021
Re: Fair Workweek Law for Fast Food Workers (2022)

Dear Commissioner Hatch:

We write on behalf of the New York State Restaurant Association (NYSRA) and the National Restaurant Association to provide comments¹ for the New York City Department of Consumer and Worker Protection's (the "DCWP") consideration on the proposed rules to implement Local Laws 1 and 2 of 2021 related to the Fair Workweek Law for fast food workers (the "Proposed Rules").

As the DCWP is aware, the food service sector is under unprecedented pressures in the current pandemic, including the small-business owners that run many of the City's franchised locations. As Mayor Adams has commented, "[o]ur small businesses have been through so much during the COVID-19 pandemic. . . . The last thing they need to deal with are unnecessary fines." In light of this focus on "cutting the red tape" – as well as on job creation, economic recovery, and a safe and healthy return to work – it is surprising that the Proposed Rules only further add to the exhaustive strain placed on the quick-service industry and the unprecedented burden due to the current COVID-19 pandemic.

As it stands, the Fair Workweek and Just Cause requirements represent the single greatest operational burden on quick-service restaurants – many of which are operated by independent franchises and small business owners – as they attempt to stay open for business and remain a part of New York City's economic recovery. The proposed rules only function to add even more

¹ Our comments are limited to operational concerns with the Proposed Rules and have no bearing on other issues with Local Laws 1 and 2 of 2021, including but not limited to issues which may have been raised in litigation against the DCWP and the City of New York.

exhaustive recordkeeping, operational restrictions, and regulatory burdens, without any meaningful benefit to the health and safety of the workforce.

The Proposed Rules are even more stringent and burdensome than the statute mandating their creation, the Fair Workweek Law. We respectfully request that the Proposed Rules be revised to be more limited in scope, in line with the original Fair Workweek legislation. The amended law and Proposed Rules will establish an unprecedented level of government intrusion into and burden on private sector business operations at a time when those businesses are struggling to survive. The result will be a chilling effect on new hiring and investment in New York City. These Proposed Rules will also set a worrying precedent beyond quick-service restaurants.

This letter discusses a few egregious examples of such burdens, but we urge the DCWP to undertake a full evaluation of the proposed rules with an eye toward job creation and economic recovery in addition to worker-focused protections. These are a few select examples of unreasonable burdens worsened by the Proposed Rules, which are discussed in greater detail below: (1) recordkeeping requirements for discharges; (2) unnecessary additional scheduling complications; (3) additional “just cause” obligations; (4) computation of time periods for schedule change premiums; and (5) variations between regular schedules and work schedules.

1. Recordkeeping Requirements for Discharges.

First, the Proposed Rules set forth onerous recordkeeping requirements for quick-service restaurants. As just one example, the Proposed Rules contemplate that an employer would need to provide the City with documents showing a fast food restaurant’s “financial condition, including tax returns, income statements, profit and loss statements, monthly gross revenue schedules, and balance sheets” in order to justify decisions to manage its own workforce. 6 RCNY § 7-603(a)(2)(xiii)(1). Such records would need to be maintained for three years. *Id.*

This is an unprecedented government intervention into business operations, whereby each operator must submit to an onerous financial audit before a government entity can decide whether personnel decisions are justified. These Proposed Rules are impractical and only add to the cost and burden of compliance. Nothing in the law itself requires the City to review or approve of such sensitive, proprietary financial data. NYC Admin Code § 20-1272(h).

While the City Council elected to give quick-service restaurants discretion to evaluate various business metrics and records in determining the necessity of discharges for bona fide economic reasons, the Proposed Rules are unreasonably burdensome and make compliance costly, intrusive, and time-consuming. Quick-service restaurants weighing a discharge decision are often in difficult financial situations, and adding a requirement that they maintain and possibly produce high-level and sensitive financial documents will make it all the more difficult for such restaurants to maintain operations.

Accordingly, the DCWP should remove the requirements for the showing of documentation related to a quick-service restaurant’s financial condition, or alternatively revise

the examples to include less sensitive metrics and materials. The DCWP should also make clear the grounds and metrics on which the Department will make decisions on what constitutes a “bona fide economic reason” for taking an employment action.

2. Unnecessary Additional Scheduling Complications.

Second, the Proposed Rules further add to impractical government involvement in employee scheduling in a manner that makes front-line management nearly impossible. As an example, the Proposed Rules require fast food restaurants to obtain written consent from fast food employees *before* they work a mere 15 minutes past their scheduled shift end time. Specifically, the Proposed Rules provide that when a “schedule change involves an unscheduled addition of time, the employee’s consent must be obtained no later than 15 minutes after the employee begins to work additional time.” 6 RCNY § 7-606(a). Notably, this impractical requirement does not appear in the Fair Workweek Law. It would have the effect of requiring fast food restaurants to aggressively police shift end times in a way that is not operationally feasible or necessary to provide predictable scheduling for employees.

For example, if a fast food employee is working a shift and they ask (or are asked) to keep working because an employee working the next shift is late, both the fast food employee and their manager will have to stop that work to execute consent forms in the midst of the shift. Such a requirement is not only well-beyond the amendments to the Fair Workweek Law which are purportedly being addressed by the Proposed Rules, but also not in the interest of either fast food restaurants or fast food employees, adding further administrative burdens to their existing workdays.

We propose that the DCWP remove this language and other language that adds to the already heavy burden of complying with over 35 pages of onerous scheduling requirements already promulgated by the City in informal guidance.

3. Additional “Just Cause” Obligations

Third, we are concerned about the elimination of managerial authority to separate employees for egregious misconduct. The Proposed Rules prohibit immediately discharging an employee, even for significant misconduct, unless it rises to the level of “violence or threats of violence, theft, sexual harassment, race discrimination, or willful destruction of property.” 6 RCNY § 7-627(c). These examples effectively set an unduly high burden for egregious misconduct. Notably, the Fair Workweek Law does not define egregious misconduct and these examples do not accurately or fully reflect the circumstances under which a fast food restaurant may need to take immediate action and terminate an employee.

Accordingly, we propose that the DCWP acknowledge that private employers should identify their own policies, procedures, and misconduct, so long as such rules are consistently applied and are not unlawful. To the extent the DCWP still believes that examples of egregious misconduct should be included in the Proposed Rule, we suggest that additional examples should

be included, including but not limited to: (a) insubordination; (b) conduct that seriously harms or threatens the health and safety of other employees, customers, or guests; (c) the falsification of time or other business records; (d) working under the influence of alcohol or illegal drugs; and (e) refusal to comply with any work-related health and safety requirements imposed by City, State, or Federal Government.

Separately, the Proposed Rules are inconsistent in that they provide a fast food restaurant may immediately discharge an employee for “willful refusal to perform work for the majority of time on a shift” but they may not immediately discharge an employee for “lateness or failure to appear for a scheduled work shift.” 6 RCNY § 7-627(b), (d). The Proposed Rules rightly do not require a fast food employer to progressively discipline a fast food employee who clocks in and refuses to work, and should also allow a fast food employer to take immediate action when a fast food employee effectively does the same thing by not reporting for their scheduled shift. Predictive scheduling within the meaning of the Fair Workweek Law should be predictive for both fast food employees *and* fast food employers, and the Proposed Rules have the effect of incentivizing no-shows (as opposed to arriving at work and not performing job duties). We suggest that 6 RCNY § 7-627(d) be removed from the Proposed Rules.

4. Computation of Time Periods for Schedule Change Premiums.

Fourth, we note that the Proposed Rules effectively write in new temporal requirements for schedule change premiums not contemplated by the Fair Workweek Law. Specifically, the Proposed Rules provide that “the amount of each schedule change premium owed is based on hours elapsed between the first day on the work schedule, which begins at 12:00 a.m., and the date and time the fast food employer transmits the revised written schedule to the affected employees or re-posts the schedule.” 6 RCNY § 7-622(a). The Fair Workweek Law contemplates notice dating to the date of the *shifts* at issue, not the date of the *first day of the work schedule containing the shifts*. See NYC Admin Code § 20-1222(a) (addressing days’ notice to the employee). There is no support anywhere in the Fair Workweek Law or legislative history for the Proposed Rules’ modification of the premium scheme to relate to the first day of a work schedule – which is not a date of significance to the fast food employee. We respectfully submit that, absent legislation re-defining schedule change premiums, the Proposed Rules instead defer to the existing statute and longstanding practice.

5. Variations Between Regular Schedules and Work Schedules

Fifth, the Proposed Rules only add ambiguity and complexity. As an example, there is ambiguity concerning what constitutes a variation in shifts between a regular schedule and a work schedule. The Proposed Rules broadly provide that a variation in shifts refers to “changes to the location of a shift, the day of the shift, the start or end times of a shift, the removal of a shift, or the addition of any shift not included on the regular schedule.” 6 RCNY § 7-621(b). Practically, however, a fast food employee does not experience a meaningful change to their predictability when a shift’s location is changed to a nearby restaurant. Moreover, under the Proposed Rules, if a shift with the same scheduled hours is moved from one day to another, it

effectively counts as a double change (the subtraction of the old shift and addition of the new shift), even where the employee's net hours remain the same and so they experience no change to their economic predictability. We respectfully suggest that the DCWP take meaningful predictability into account when considering what constitutes a variation of 15 percent from a regular schedule and throughout its rules.

Finally, at a broad level, we note that the Proposed Rules are even more stringent and burdensome than statute mandating their creation, the Fair Workweek Law. We respectfully request that the Proposed Rules—at a minimum—be revised so that they are consistent with the more-limited scope promulgated by the City Council in amending the Fair Workweek Law.

The ambiguities and issues outlined above demonstrate just a few of the difficulties facing fast food restaurants who endeavor to comply with the Fair Workweek Law as amended. For these reasons, we ask the DCWP to review the Proposed Rules and revise them accordingly. Please do not hesitate to contact the undersigned to discuss. Thank you for your consideration.

Respectfully submitted,



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